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## Redrawing the Law's Definition of Property in the Light of Contemporary Use of Urban Surfaces

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### I. Introduction

There has been recent debate about whether a new 'Banksy' work entitled 'Draw the Raised Bridge!' on a disused bridge in Hull should be cleaned off or celebrated as a significant contribution to Hull's 2017 city of culture status.<sup>1</sup> A local Conservative councillor was reported as stating that the piece 'should be cleaned off. It should be photographed and the photograph kept because Banksy is not without talent', while a BBC Arts Editor stated,

I don't think you can remove it ... I think the whole point of Banksy's work is they are what is called site-specific ... they work because of the places they've been put and if you remove the location the work loses its power.<sup>2</sup>

The debate reflects opposing views about graffiti and the relationship of power and place. Who (particularly if, as in this case, ownership of the locus is unclear) has the right to make the decision to remove or leave this Banksy, and why? How is power over location or places – particularly those which physically and sometimes legally traverse the private/public divide – exercised and regulated (and the two may not be synonymous)? And what does this tell us about the law that governs property?

Kevin Brown has comprehensively covered much of the law relating to public space, particularly the use of criminal sanctions to control human activity.<sup>3</sup> In this chapter I seek to unravel the legal underpinnings, primarily but not solely of private law, which inform both the Hull councillor's point of view and the observation of the Arts Editor. In order to do this I first look at the idea of taxonomies and how different taxonomical approaches to concepts may provide scope for defining property more broadly. Drawing on Kevin Gray's work, I then consider how a more flexible, contextually aware definition of property

<sup>1</sup> Banksy is a recognised but unidentified graffiti 'artist', whose 'pieces' are deemed to be highly collectible and of considerable economic value. See eg L Collins, 'Banksy Was Here', *The New Yorker* (New York, May 14 2007).

<sup>2</sup> BBC News, 'Hull Banksy Mural "should be cleaned off"', *BBC News* (London, 27 January 2018): <http://www.bbc.co.uk/news/uk-england-humber-42844953>.

<sup>3</sup> K Brown, 'The Hyper-regulation of Public Space: the Use and Abuse of Public Spaces Protection Orders in England and Wales' (2017) 37 *Legal Studies* 543.

might accommodate changing, practical realities. To do this, the focus is on the surfaces of the built environment (the ground, walls, bridges, roofs, etc) and activities that challenge or reframe the concepts underpinning Gray's definition, particularly the right to exclude. This can be illustrated by the Banksy controversy but also by other activities taking place in cities, towns and villages, particularly about property falling within the public domain. The chapter concludes by suggesting that the way in which we define property can inform our approach to the taxonomy of property law.

## II. The Taxonomy of Law

Sheehan and Arvind<sup>4</sup> suggest that, in its broadest sense, there are three dimensions to the taxonomy of law: 'the selection of sets of ideas, categories and concepts used to describe and order the subject of study'; 'the basis on which we constitute and give content to these concepts and categories'; and 'the relationship between the various categories, concepts and ideas we use to describe the area of study'. The taxonomy of law is used to determine whether or not a set of facts is subject to a set of rules that give rise to legal consequences: 'Taxonomy in law is about how we treat the subject of our taxonomy.'<sup>5</sup> Sheehan and Arvind argue that 'the shape of a taxonomy depends on its purpose'.<sup>6</sup> In this chapter I suggest that we might reverse this proposition by starting with the realities of how people relate to urban space, using this to inform a definition of property which can accommodate the reality, and using the concept (or subject) to determine the taxonomy.

Not everyone regards the taxonomy of law in the same way.<sup>7</sup> In private law, for example, there is considerable debate chiefly among those who support Peter Birks's line of reasoning and those who do not.<sup>8</sup> This chapter does not intend to engage with that debate but instead to try to extract some bare bones that might be applied in the field of property law. Sheehan and Arvind point to two main schools of thought: 'interpretivists' and 'contextualists'. While the former prefer to rely on legal principles of general application justified by context-neutral norms (and so are aligned jurisprudentially with legal positivists), the latter allow more room for policy and consideration of the actual context in which the law is applied (and so are aligned jurisprudentially with legal realism). Contextualists may be more ready to accept change because their realist view of the law is more 'socially and empirically grounded';<sup>9</sup> and their understanding of concepts 'more *evidently* linked to social facts and circumstances'.<sup>10</sup> The interpretivist school of thought instead adopts a more rigid,

<sup>4</sup>D Sheehan and RR Arvind, 'Private Law Theory and Taxonomy: Reframing the Debate' (2015) 35 *Legal Studies* 480.

<sup>5</sup>*ibid* 484.

<sup>6</sup>*ibid* 483.

<sup>7</sup>See for example E Sherwin, 'Legal Taxonomy' (2009) 15 *Legal Theory* 25. Sherwin adopts a threefold approach: formal, function, reason-based taxonomy.

<sup>8</sup>For this see for example P Watts, 'Taxonomy in Private Law – Furor in Text and Subtext' (2014) *New Zealand Law Review* 107; K Low, 'The Use and Abuse of Taxonomy' (2009) 29 *Legal Studies* 355; and Sheehan and Arvind (n 4 above).

<sup>9</sup>Sheehan and Arvind (n 4 above) 496.

<sup>10</sup>*ibid* 497.



socially detached, static view of concepts and the categorisation of these into legal subjects (contract, tort etc), preferring certainty and clear rules.

Significantly for this chapter, Sheehan and Arvind argue that taxonomies can work in different ways. They can be descriptive: used primarily as an organisational tool at a particular moment in time or for a particular purpose – such as might be deployed for example in outlining the content of a law module; prescriptive, in which case they tend to be rather static – such as the taxonomy of the law of contracts; or developmental, dynamically recognising and accommodating change in both the process and appearance of the law – as found for example in the evolution of equitable solutions to novel problems. The prescriptive approach, while it might create certainty and consistency in the application of the law may be of limited use in hard or novel cases. If, then, one adopts a 'contextualist' and 'developmental' approach to the taxonomy of law it might be possible to propose a new taxonomy, taking into account social change, challenges to existing normative underpinnings, and the identification of new values in society that need to be reflected in the law. This aligns with 'the realist taxonomic enterprise', which Dagan describes as 'both backward and forward looking, constantly challenging the continued validity and desirability of the normative underpinnings of existing legal categories'.<sup>11</sup>

Sheehan and Arvind suggest that 'Taxonomies that seek to be useful ... must not only prescribe an ideal answer, but also chart a path by which the legal system gets from its current position to the proposed position'.<sup>12</sup>

To do this it is necessary to understand, or to determine the concepts used in the taxonomy of any legal category. This task can be divided into considering how concepts are constructed – what is their content, and how are they used to determine what falls within and what falls without the concept? Sheehan and Arvind suggest that concepts are individuated one from the other and use the example of estoppel.<sup>13</sup> Within this concept are sub-concepts; representation in respect of property interests (at least for proprietary estoppel), reliance on that representation in some way, and detriment which would not have been incurred were it not for the representation and reliance. There is an interrelationship between these sub-concepts that must all be met to satisfy our understanding of proprietary estoppel. To determine whether something falls within the concept, a set of facts is tested against the sub-concepts. Sheehan and Arvind refer to this approach of looking at concepts as 'intension' and 'extension'. The intension of a concept is 'the set of conditions that a thing must satisfy to fall under the concept',<sup>14</sup> while the extension is 'the set of things that ... "fall under" the concept'.<sup>15</sup> Some concepts might look similar by extension but their intension is different. Sheehan and Arvind use Frege's example of the planet Venus,<sup>16</sup> the intension of which may differ because it is referred to as both the Evening Star and the Morning Star, but the extension of which is the same.

<sup>11</sup> H Dagan, 'Legal Realism and the Taxonomy of Private Law' in C Rickett and R Grantham (eds), *Structure and Justification in Private Law* (Oxford, Hart Publishing, 2008) 147, 161.

<sup>12</sup> Sheehan and Arvind (n 4 above) 488.

<sup>13</sup> *ibid* 489.

<sup>14</sup> *ibid*.

<sup>15</sup> *ibid*.

<sup>16</sup> *ibid*.

These, however, are shifting sands, especially if one adopts a contextualist approach, which Sheehan and Arvind suggest is one not so much interested in there being 'some inherent quality about a concept',<sup>17</sup> as the application of the concept in particular circumstances.

An example might be found in the case of estoppel. The influence of a contextual approach which looks at the application of a concept in particular circumstances has seen a shift away from the 'five probanda' (or sub-concepts of proprietary estoppel) of *Willmott v Barber*,<sup>18</sup> to a looser set of sub-concepts or criteria: representation, reliance and detriment.<sup>19</sup> Indeed, it might be argued that the concept of estoppel now overlaps with the concept of constructive trust.<sup>20</sup> So, the intension of estoppel has changed. At the same time, however, those very sub-concepts that make up the concept of estoppel are subject to variation, so while we may teach students that these three elements are required, in fact the case-law suggests there are many variations of, for example, representation, so it is difficult to be absolute about what constitutes a representation<sup>21</sup> and whether the concept is the same in domestic or commercial contexts, or situations of imperfect gift, unilateral mistake or common expectation cases.<sup>22</sup> There is, then, scope for manipulating (depending on one's viewpoint or theoretical approach) the constituent elements of a concept and their importance. For example, in *Taylor's Fashions*, Oliver J observed (regardless of the category of estoppel being referred to) that what was required was:

a very much broader approach which is directed rather at ascertaining whether, in particular individual circumstances, it would be unconscionable for a party to be permitted to deny that which knowingly, or unknowingly, he has allowed or encouraged another to assume to his detriment than to enquiring whether the circumstances can be fitted within the confines of some preconceived formula serving as a universal yardstick for every form of unconscionable behaviour.<sup>23</sup>

Sheehan and Arvind ask 'What are the consequences of highlighting certain factors while omitting others?'<sup>24</sup> The answer either must be that certain sets of facts or circumstances fall outside the concept or are brought within it, and this intended or unintended result is determined by the normative underpinnings of the concept and its sub-concepts. So, if judges find on the facts and through a broad application of the sub-concepts that there

<sup>17</sup> *ibid.*

<sup>18</sup> *Willmott v Barber* (1880) 15 Ch D 96.

<sup>19</sup> *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd* [1979] EWHC (Ch) 1. Following with approval Buckley LJ in *Shaw v Applegate* [1977] 1 WLR 970, 978: 'I do not ... think it is clear that it is essential to find all the five tests set out by Fry J (in *Willmott v Barber*) literally applicable and satisfied in any particular case. The real test, I think, must be whether upon the facts of the particular case, the situation has become such that it would be dishonest or unconscionable for the plaintiff, or the person having the right to be enforced, to continue to seek to enforce it'.

<sup>20</sup> Sheehan and Arvind (n 4 above) 499 suggest there is also an overlap with the concept of contract but it is unclear here if they are referring to promissory or proprietary estoppel. On the taxonomy of proprietary estoppel see Lord Neuberger of Abbotsbury, 'The Stuffing of Minerva's Owl – Taxonomy and Taxidermy in Equity' [2009] *CLJ* 537.

<sup>21</sup> See, for example, comments by Lord Walker in *Yeoman's Row Management Ltd and Another v Cobbe* [2008] UKHL 55, [2008] 1 WLR 1752. Contrary to the usual meaning of representation, it would seem that standing by or simply allowing would be sufficient for representation.

<sup>22</sup> This is a classification proposed by K Gray and SF Gray, *Elements of Land Law*, 4th edn (Oxford, Oxford University Press, 2005) [10.189], cited by Lord Walker in *Cobbe* (n 21 above) at [48].

<sup>23</sup> *Taylor's Fashions Ltd v Liverpool Victoria Trustees Co Ltd* (n 19 above) 151–52.

<sup>24</sup> Sheehan and Arvind (n 4 above) 491.

is an estoppel, then this might undermine or eventually change the intension of estoppel. Changing the content or meaning of concepts by themselves will not necessarily create a new taxonomy, but from a contextual/realist perspective, it is important that a taxonomy of property law should be sufficiently dynamic to accommodate the judicial development of concepts, particularly if this judicial response is in reaction to changing norms reflecting changes in society. The taxonomy we adopt may have consequences for how flexible we can be in developing and applying individual concepts within that taxonomy.

The question for taxonomy appears to be how this evolution of norms or the 'moral element'<sup>25</sup> of concepts can be used to marry conceptual and contextual approaches to create new taxonomies, or, how do we taxonomise shifting concepts? One approach suggested by Sheehan and Arvind is to adopt a Hegelian teleological approach, ie what is the purpose of the law? This can be both 'backwards-looking and forwards-looking',<sup>26</sup> but it does require engagement with, and revaluation of concepts and categories as well as a recognition of the ways in which concepts and categorisation 'constrain and shape the manner in which the law responds',<sup>27</sup> which may sit uneasily with contextualists' view of the 'inherently indeterminate nature of concepts'.<sup>28</sup> The danger of a teleological approach is that it may be very undemocratic, reflecting the interests of a dominant elite or a particular political agenda. Alternatively, in looking forward it could strive to be more democratic, less party-politics orientated, and more inclusive. A teleological shift in housing law, for example, might involve the expansion or reduction of social housing.

### III. The Taxonomy of Property Law

Eveline Ramaekers points out that before we can decide what property law is, we have to be sure that there is such a category as 'property law' that can be marked out from other areas of law.<sup>29</sup> She highlights the many different ways of looking at property. The fact that we might refer to the teaching of 'Land Law', or of 'Commercial Property Law' underscores the challenge and the way in which lawyers subsequently think about property based on the pragmatic considerations of legal education. As will be seen in the examples below (and as became very evident at the 2018 Modern Studies in Property Law conference), there are not always clear boundaries between, say, property law and tort law,<sup>30</sup> or contract law<sup>31</sup> or even criminal law.<sup>32</sup> Ramaekers focuses in particular on the fuzzy boundaries between the law of property and the law of obligations and the different ways in which these are delineated in different authorities and in different legal systems. If one accepts these overlapping

<sup>25</sup> *ibid* 493.

<sup>26</sup> *ibid* 500.

<sup>27</sup> *ibid*.

<sup>28</sup> *ibid*.

<sup>29</sup> E Ramaekers, 'What is Property Law' (2017) 37 *OJLS* 588.

<sup>30</sup> See eg D Nolan, 'The Essence of Private Nuisance' Chapter 5 in this volume.

<sup>31</sup> See eg F Bettini, 'Long Leases and Affordable Housing: A Comparative Analysis of French and English Law' Chapter 13 in this volume.

<sup>32</sup> See eg R Hickey, 'Defending Property: Self-help Remedies, the Use of Force, and the Concept of a Property Right' Chapter 4 in this volume.

boundaries then the categorisation of property law needs to be based on concepts which are themselves not subject-bound. So, for example, if one bases property law on the law of things, or the 'thinginess' of the subject-matter, then one is immediately faced with the challenges of new forms of property. Similarly, one might argue the same for the term 'resource' used by Gray, insofar as while this suggests a 'thing' to which a value is attached, what is valued will change as society changes. For the purposes of this chapter, I propose to adopt Gray's view<sup>33</sup> that property is about control over access and the power to exclude:

'Property' is the power-relation constituted by the state's endorsement of private claims to regulate the access of strangers to the benefits of particular resources. If, in respect of a given claimant and a given resource, the exercise of such regulatory control is physically impracticable or legally abortive or morally or socially undesirable, we say that such a claimant can assert no 'property' in that resource.<sup>34</sup>

This categorisation, based on a number of separate but inter-related concepts (control, access, power, exclusion, etc), avoids too much consideration of the nature of the 'thing' or 'resource' and focuses instead on relationships. It also, I think, lies at the essence of the diverging views of the Hull councillor and the BBC Arts Editor and, when the concepts are examined in the context of the examples below, admits the possibility of a new taxonomy.

Gray's definition is attractive (for my purposes) because he argues that dominium is not limitless but may be 'curtailed by limitations of a broadly "moral" character'.<sup>35</sup> Property, he argues, is limited to the control exercised over access.<sup>36</sup> He also points out that property is not a thing; that some resources are not propertised – and therefore belong to no one or to everyone. Even if they are propertised, dominium is subject to limitations, incursions and restrictions, and property is dynamic and potentially a morally limited concept because 'physical, legal and moral conditions of excludability may vary according to time and circumstance'.<sup>37</sup> Together this suggests that there is some room for change, but the starting point is that something is property if it has the attribute of excludability: 'A resource is "excludable" only if it is feasible for a legal person to exercise regulatory control over the access of strangers to the various benefits inherent in the resource'.<sup>38</sup> He suggests that there are three grounds on which non-excludability may rest: physical, legal, and moral. Gray acknowledges that what is an excludable or non-excludable resource – and therefore property – is fluid. What might not be property today could be property tomorrow.

Most importantly, Gray suggests that 'the test of moral excludability is much more closely concerned with those social conventions or mores which promote integrative social existence than with any normative judgment about individual human conduct'.<sup>39</sup> He is referring to what we might regard as the global commons or resources for the common good, but his test does not have to be limited to these, because as he states:

In setting the moral limits of 'property', the courts effectively recognise that there is some serial ranking of legally protected values and interests: claims of 'property' may sometimes be overridden

<sup>33</sup> K Gray, 'Property in Thin Air' (1991) 50 *CLJ* 252.

<sup>34</sup> *ibid* 294.

<sup>35</sup> *ibid* 287.

<sup>36</sup> *ibid* 294.

<sup>37</sup> *ibid* 295–96.

<sup>38</sup> *ibid* 268.

<sup>39</sup> *ibid* 280.

by the need to attain or further more highly rated social goals ... The predominating emphasis expressed in the notion of moral non-excludability is the need to afford especial protection to those values which promote human communication and social intercourse.<sup>40</sup>

The important point – for this chapter, is that ‘property rights are merely prima facie rights which may be abridged or overridden by other moral concerns.’<sup>41</sup> Gray goes on to point out that these moral limits can include land. He cites the example of the Australian case of *Gerhardy v Brown*.<sup>42</sup> In this case the requirement for non-Pitjantjatjaras (the Pitjantjatjara are an Aboriginal peoples) to have permission to enter lands designated under the Pitjantjatjara Land Rights Act 1981 was challenged as being contrary to the Racial Discrimination Act 1975 and the normal incidents of ownership. The High Court of Australia held that in the context of this particular land, the exclusion by operation of statute was lawful. Commenting on the case, Gray concludes

Although accepting that the right to exclude strangers is ordinarily an incident of ownership of land the Court was able to contemplate circumstances in which this right of exclusion might be abridged by more highly valued social objectives. In thus delineating the limits of ‘property’, the High Court significantly emphasised the need to promote those moral or political standards which enrich life and constructive social interaction within a community of equals.<sup>43</sup>

In this case, the statutory restrictions were a special measure to address historical racial inequalities.<sup>44</sup>

The consideration of moral grounds for non-excludability calls into play the intersection of public and private. Although he is primarily referring to private property Gray points out that no property is truly private,<sup>45</sup> ‘and in underpinning the law of ‘property’ the state indirectly adjudicates an exceedingly broad range of the power-relations permitted within society.’<sup>46</sup> If our taxonomy of property focusses only on private law, there is a danger that the influence and impact of the state or the public parts of property law will be overlooked. This is significant not only in practical terms but also for informing the norms underpinning concepts. This is played out in the debate as to the Hull Banksy work. Both spokespersons are private individuals representing public bodies – the council and the BBC. Both are expressing what might be private or official (public) views and both are drawing on certain understandings of valued social objectives.

Adopting a developmental/contextualist approach which, as suggested by Sheehan and Arvind, is ‘more ‘socially and empirically grounded’;<sup>47</sup> and ‘more *evidently* linked to social facts and circumstances’;<sup>48</sup> and drawing on the concept and sub-concepts in Gray’s definition, it may be possible to define property in a way that is sufficiently flexible to take into account changing realities and values, without abandoning established tenets entirely. The following table suggests how Gray and Sheehan and Arvind might be brought together.

<sup>40</sup> *ibid* 281.

<sup>41</sup> *ibid* 283.

<sup>42</sup> *Gerhardy v Brown* (1985) 159 CLR 70. This was essentially a case concerned with the scope of the Racial Discrimination Act 1975, especially positive discrimination in favour of Aboriginal peoples.

<sup>43</sup> Gray (n 33 above) 289.

<sup>44</sup> *Gerhardy v Brown* (n 42 above). See on this the *dictum* of Justice Brennan, [33]–[34].

<sup>45</sup> Gray (n 33 above) 304.

<sup>46</sup> *ibid*.

<sup>47</sup> Sheehan and Arvind (n 4 above) 496.

<sup>48</sup> *ibid* 497.



Gray	Sheehan and Arvind
Excludability	Primary concept
Power	Sub-concept the extension of which is endorsement by the state
Access	Sub-concept the extension of which is regulation of benefits
Control	Sub-concept the extension of which is a physically possible, legally effective and morally defensible power to exclude

If we apply the concepts to a set of facts, then where the state endorses the exercise of the power to exclude through its legal frameworks and agents; regulates access to the benefits by determining who may and may not have access; and – through affording remedies or imposing sanctions – upholds the control of the subject-matter, then there is property. This might be illustrated by considering how courts determine if there is a lease rather than a lesser right. An interpretivist, preferring certainty, might hold that unless there is a term certain and exclusive possession there is no lease, whereas the contextualist might argue that the rigour of exclusive possession needs to be subject to a further set of sub-concepts because of the unscrupulous behaviour of some landlords. An example of this can be found in the case of *Antoniades v Villiers*.<sup>49</sup> This then raises the question of what norms underpin the inclusion/exclusion determined by the extension of these concepts. It is here that we can see the relevance of Gray's three grounds on which non-excludability based on control may rest.

To illustrate this I focus on the contextual and factual interaction of people with surface areas – largely but not solely – in urban environments. In doing so I intend to draw attention to Gray's three grounds for non-excludability (physical, legal and moral), and thereby challenge 'the continued validity and desirability of the normative underpinnings of existing legal categories'.<sup>50</sup> In this way it might be possible to arrive at a slightly different set of sub-concepts which then inform a new 'realist taxonomic enterprise'<sup>51</sup> that is compatible with Dagan's aim of 'constantly challenging the continued validity and desirability of the normative underpinnings of existing legal categories'.<sup>52</sup>

#### IV. Guerilla Gardeners, Graffiti Artists, and Park-Runners

There is a broad spectrum of human interaction with the surfaces of the physical environment from lawful to beyond the law, or 'outlawed' activity, which takes place on horizontal and vertical surfaces that may be regarded as private or public property, or private or public space, or may fall somewhere in between (the abandoned bridge in Hull is a case in point). For purposes of illustration, the social interaction of three groups of people with the

<sup>49</sup> *Antoniades v Villiers* [1990] 1 AC 417. See S Bright, 'Beyond Sham and into Pretence' (1991) 11 *OJLS* 136.

<sup>50</sup> Dagan (n 11 above) 147, 161.

<sup>51</sup> Sheehan and Arvind (n 4 above) 485.

<sup>52</sup> Dagan (n 11 above).



physical space of urban areas will be considered: guerrilla gardeners, graffiti artists, and park-runners. Each of these groups engages with the surfaces of the environment in different ways and their engagement reflects something other than property interests as currently defined, but does raise issues of power, access, and control. This is not to suggest the law is irrelevant; rather that the law both shapes and influences social action and operates as a trigger for resistance and rebellion. The past (backward-looking) therefore informs the present, and prompts us to think about change (forward-looking). These activities have been selected because they challenge excludability, either physically, legally and/or morally, and therefore our understanding of what property is.

In urban areas while the physical boundaries of place may be more apparent due to the hard-edged environment, the boundaries of spaces are more porous and may be more volatile.<sup>53</sup> Spaces may be 'claimed' by city parks authorities, private householders, individuals or collectives, relying on legal concepts informed by accepted and often-unchallenged normative or moral underpinnings. Skateboarders, graffiti artists, gangs, rough sleepers, guerrilla gardeners, and people on the move may make claims to place, either temporarily or more permanently. If Gray's emphasis on excludability as a defining characteristic of property is applied, then the question is who controls these places, who has access, who benefits and therefore which set of facts or objects falls within the definition of the concept? For example, the graffiti artist who throws up a 'piece' claims the wall, railway siding, fence, as his or her 'spot' or place – 'this is mine, I was here'. The person sleeping in a doorway defends his or her place, marking it with a selection of paraphernalia to indicate its boundaries; the seed-bomber planting in the small gaps around council trees in the pavement, makes a fleeting claim to the garden created; residents cultivating vegetables on the mini-roundabout in a residential street may make a longer-term commitment. The relationship of people in these examples to the places they use are empirical facts and socially grounded: people do these things and they do them for a social reason. The claims they make in respect of the surfaces/property they use may not be claims of ownership as generally understood, because the space may be 'owned' by others, even if within the public domain (here used in a non-legal sense). However, these acts of engagement demonstrate the relationship – perhaps merely transient – of the individual or collective with the physical environment in which they are located and with society, and various values in society. A descriptive or prescriptive taxonomy of property law cannot accommodate these engagements. A developmental taxonomy might do so in so far as 'developmental taxonomies see the law as being in a process of change'.<sup>54</sup> If, following a realist or contextualist approach, the law is to respond to change, then the concepts that inform it also have to change. The following practical realities are used to demonstrate how Gray's concept of property might be developed by incorporating some sub-concepts into the idea of exclusion as a defining characteristic of property.

<sup>53</sup> Space and place are distinguished in human geography and architecture. Space is open, abstract and subjective, while place refers to how people claim or use a location or part of space. Layard has drawn attention to the abstract nature of property law and the physical materiality of place and the way in which law has encroached on space to enclose it within the law and exclude multiple claims. A Layard, 'Shopping in the Public Realm: The Law of Place' (2010) 37 *Journal of Law and Society* 412. See also Willmore's use of these terms in C Willmore, 'Planning Law Reform and Reconceptualising the Regulation of Land Use' in H Conway and R Hickey (eds), *Modern Studies in Property Law*, vol 9 (London, Hart Publishing, 2017) ch 14.

<sup>54</sup> Sheehan and Arvind (n 4 above) 485.

## A. Guerrilla Gardeners

The guerrilla gardening movement in its present form first started in New York in the 1970s as part of the counter-culture movement of the time.<sup>55</sup> Today it might be seen as part of a much wider socio-cultural movement of individual and community engagement with gardening in diverse ways, which reflects growing concern with the environment, with sustainable development, with the accountability of public authorities, and with the retention or safeguarding of public space.<sup>56</sup> Guerrilla gardening might also be carried out as a form of protest.<sup>57</sup> For example, a recent manifestation of guerrilla gardening is the construction of miniature gardens in potholes in roads to draw attention to poor road maintenance.<sup>58</sup> Alternatively, it may also be viewed positively as a social and cultural phenomenon which brings people together either as individual members of the movement or as groups initiating community projects. There is therefore a certain moral ambivalence surrounding guerrilla gardening: Is it a constructive or destructive use of property? Is it beautification or vandalism? Is it anti-social, because it is often secretive or done without permission? Or is it in fact socially constructive, bringing people with common concerns together? Are there in fact moral grounds for non-excludability? If so, what are these and how extensive should they be?

In principle, there is legal excludability, not least because of the legal control of spaces. In practice, however, the available legal tools appear weak. Firstly, on the face of it, guerrilla gardening engages less with property law and more with the law of tort and potential breaches of the criminal law (although prosecution of guerrilla gardeners in the UK seems very rare).<sup>59</sup> While gardening on some locations may raise health and safety issues,<sup>60</sup> the positive actions of guerrilla gardeners might counteract the negative actions of the local authority or private landowner who might otherwise be charged with health and safety offences – for example, because of the rubbish fly-tipped on land, or the use to which it is put for drug-dealing and prostitution. The moral grounds for an owner's right to exclude are thus undermined. Similarly, while the tort of trespass is available to landlords or owners of guerrilla gardened spaces, the quantum of damages is likely to be negligible, especially if the guerrilla gardeners have cleared the space of rubbish and enhanced it aesthetically by planting. Suing in the tort of nuisance is also unlikely to be successful, especially where the gardeners may have removed a number of pre-existing potential nuisances.

<sup>55</sup> M Fraser, 'How Guerrilla Gardening Took Root', *BBC News (Scotland)* (London, 15 March 2010) available at: <http://news.bbc.co.uk/1/hi/scotland/8548005.stm>.

<sup>56</sup> S Farran, 'Earth Under the Nails: The Extraordinary Return to the Land' in N Hopkins (ed), *Modern Studies in Property Law*, vol 7 (Oxford, Hart Publishing, 2013) 173–91; O Zanetti, *Guerrilla Gardening: Geographers and Gardeners, Actors and Networks: Reconsidering Urban Public Space* (MA/MSc dissertation, Queen Mary, University of London, 2007) available at: <http://www.guerrillgardening.org/books/ZanettiGG.pdf>.

<sup>57</sup> G McKay, *Radical Gardening: Politics, Idealism and Rebellion in the Garden* (London, Francis Lincoln Limited, 2011).

<sup>58</sup> BBC Trending, 'Thai Women Take Dip in the Road in Pothole Protest', *BBC News* (London, 29 September 2016) available at: <https://www.bbc.com/news/blogs-trending-37485461>.

<sup>59</sup> A search of reported cases on the legal data base Westlaw revealed very few cases in which prosecutions were brought. See also B Daniel, "'Guerrilla Gardeners' in Morpeth Risk Prosecution to Carry Out Clean Up', *ChronicleLive* (Newcastle, 29 September 2014) available at: <https://www.chroniclelive.co.uk/news/north-east-news/guerilla-gardeners-morpeth-risk-prosecution-7847167>.

<sup>60</sup> For example the embankments or roundabouts.

Moreover, these activities may take place on 'orphaned' or abandoned land the ownership of which is unclear, so from a property law perspective there is no one to bring an action. There is also land that has been purchased for development, often by speculative absentee investors or local councils, which is left undeveloped. So it may be many years before the guerrilla gardening activity is challenged. The issue of legal excludability is also undermined by the 'adoption' of guerrilla projects by local councils or communities keen to gain the moral high ground on green or environmentally sensitive policies,<sup>61</sup> or an owner's willingness to tolerate the projects as a form of 'harmless' protest.<sup>62</sup>

## B. Graffiti Artists

Mixed attitudes towards graffiti are evident in the example at the start of this chapter. In some cases and in some places graffiti may be regarded as cultural heritage – indeed attendees at the 2018 Socio-Legal Studies Association conference in Bristol were offered a cultural tour of the works of Banksy. Others share the view of the Hull city councillor and have suggested that graffiti is no more than vandalism, anti-social behaviour, and an attack on private property;<sup>63</sup> still others have ambivalent views.<sup>64</sup> Negative stereotyping may be due to the failure to distinguish between different forms of graffiti, or because the line between what might be regarded as mere 'tagging'<sup>65</sup> and what is regarded as 'art' in the world of graffiti is contentious.<sup>66</sup> Not all share the view that graffiti is 'street art', not least because of the location of the expression. Banksy himself is quoted as asking, 'Is graffiti art or vandalism? That word (art) has a lot of negative connotations and it alienates people, so no, I don't like to use the word "art" at all.'<sup>67</sup> Indeed the very term 'art' may be contrary to the political and social messaging behind graffiti.

Clearly, the act of graffiti breaches the physical excludability of the sites where it appears. As with guerrilla gardening, from the perspective of legal excludability graffiti straddles public and private law. It is categorised as criminal damage,<sup>68</sup> and potentially attracts a

<sup>61</sup> R Hudson, 'Guerrilla Gardens: What Happens When Communities Take Over Council Land' *The Guardian* (London, 3 June 2014) available at <https://www.theguardian.com/local-government-network/2014/jun/03/guerrilla-gardens-communities-council-land-social>.

<sup>62</sup> O Kolokouris, 'Urban Gardening in Greece – A New Form of Protest' (2015) 11 *Green European Journal* 43.

<sup>63</sup> Crime Concern, 'Vandalism, Graffiti and Environmental Nuisance on Public Transport – Literature Review' (London, Department of Transport, Local Government and the Regions, 2004); A Akbar and P Valley, 'Graffiti: Street Art – or Crime?', *The Independent* (London, 16 July 2008) available at: <http://www.independent.co.uk/arts-entertainment/features/graffiti-street-art-ndash-or-crime-868736.html>.

<sup>64</sup> Akbar and Valley (ibid); D Rogers, 'Speaking With: Cameron McAuliffe on Graffiti, Art and Crime', *The Conversation* (Melbourne, 24 March 2015) available at: <http://theconversation.com/speaking-with-calemson-mcauliffe-on-graffiti-art-and-crime-39183>.

<sup>65</sup> The artistic presentation of 'signatures'.

<sup>66</sup> N Sanchez, 'Graffiti: Art Through Vandalism: A Look at the Urban Art Movement Through the Scope of Aesthetics and Illegality' (Communication Over the Internet, University of Florida, undated) available at: <http://iml.jou.ufl.edu/projects/fall07/Sanchez/art.html>; N Patel, 'Graffiti in Austin: Crime or Art?' (*Graffiti vs Art*, April 2010) available at: <https://whatisart320.wordpress.com/>.

<sup>67</sup> C McAuliffe and K Iveson, 'Art and Crime (and Other Things Besides ...): Conceptualising Graffiti in the City' (2011) 5 *Geography Compass* 128, 130.

<sup>68</sup> Graffiti falls under section 1 of the Criminal Damage Act 1971, which states 'A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property

punishment of imprisonment for adult offenders if the damage (usually assessed by the cost of removal of the graffiti) exceeds £5,000.<sup>69</sup> Minor graffiti offences are punishable by a penalty notice of £50 issued under the Anti-Social Behaviour Act 2003,<sup>70</sup> or a caution.<sup>71</sup> In other words while some graffiti is criminalised as being merely anti-social, other graffiti is criminalised as damage to property.

However, criminalising graffiti is not without its problems. Firstly, there is the issue of whether a specific piece of graffiti – or all graffiti (and the law makes no distinction) – is ‘damage’. This term is not defined in the legislation but has been explained as being when the value or usefulness of a thing is impaired,<sup>72</sup> permanently or temporarily.<sup>73</sup> The limits of this definition are evident in the decisions of the courts, where it has been held that whether or not there is damage is a matter for the jury to decide so that graffiti *may* be damage, but equally it *may* not.<sup>74</sup> As Edwards points out,

the spatial contexts in which graffiti is situated need to be considered if its social, aesthetic and legal significance is to be appreciated. They (the court decisions) also show the contested economic, social and political value of some publicly situated property.<sup>75</sup>

Secondly, if the property is neither destroyed nor damaged, and there is no intent to do so, can this be labelled criminal damage?<sup>76</sup> Much may depend on the phrase ‘without lawful excuse’. Does the creation of a work or art amount to a lawful excuse – which might undermine legal excludability, or is this merely a moral argument – which if upheld could undermine moral excludability? What is art is a very subjective point of course and may have no place in informing legal concepts: the Hull Banksy is a case in point. For many (including Banksy) the term ‘art’ may have negative connotations and be rejected by the artist even though others may refer to the work as ‘art’. Could, however, the aesthetic enhancement of an ugly hoarding or boarded up warehouse afford a ‘lawful excuse’ for an otherwise potentially criminal act, thereby providing a defence to the charge?<sup>77</sup> Under the relevant criminal law, a ‘lawful excuse’ rests on the belief of consent.<sup>78</sup> Such is the nature of

or being reckless as to whether any such property would be destroyed or damaged shall be guilty of an offence. Damage that is evidently less than £5,000 in value is tried as a summary offence (subject to a fixed fine) in the Magistrates’ Court (Magistrates’ Courts Act 1980). Where the damage is less than £5,000 the maximum sentence is three months’ imprisonment or a fine of £2,500 for adult offenders.

<sup>69</sup> For those aged 12–17 years, the maximum custodial penalty is a detention and training order of up to 24 months.

<sup>70</sup> In England and Wales, s 48 of the Anti-Social Behaviour Act 2003 gives local authorities the power to serve graffiti removal notices on certain bodies responsible for the surface where graffiti has appeared. These bodies include the owners of street furniture (bus shelters, street signs, phone boxes, etc). In England and Wales, the Clean Neighbourhoods and Environment Act 2005 enlarges the powers of local authorities and the police.

<sup>71</sup> Guidelines issued by the UK Government suggest a caution for the minor offence of writing graffiti on a bus shelter: <https://www.gov.uk/caution-warning-penalty>.

<sup>72</sup> *R v Fiak* [2005] EWCA Crim 2381, [2005] Po LR 211.

<sup>73</sup> *Morphitis v Salmon* [1990] Crim LR 48.

<sup>74</sup> See cases cited by I Edwards, ‘Banksy’s Graffiti: A Not-so-Simple Case of Criminal Damage’ (2009) 73(4) *Journal of Criminal Law* 345–61.

<sup>75</sup> *ibid* 351.

<sup>76</sup> Criminal Damage Act 1971 s 1: ‘A person who without lawful excuse destroys or damages any property belonging to another intending to destroy or damage any such property or being reckless as to whether such property would be destroyed or damaged shall be guilty of an offence.’

<sup>77</sup> Edwards (n 74 above).

<sup>78</sup> Section 5(2)(a) of the Criminal Damage Act 1971 provides that a lawful excuse may be raised if: ‘at the time of the act or acts alleged to constitute the offence he believed that the person or

graffiti that this is unlikely – except where work is commissioned or surfaces are intentionally provided for graffiti. If, however, the artist is an eminent graffiti artist then he/she might presume consent – the graffiti will after all enhance the value of the building. If the surface is a public building, even if in ‘private’ ownership, could the consent of the public be relevant? Could the possibility of subsequent public approbation of damage to publicly owned buildings allow a defendant to meet the test for the lawful excuse defence in section 5(2)(a) of the Criminal Damage Act 1971 by showing that

he believed that the person or persons whom he believed to be entitled to consent to the destruction of or damage to the property in question had so consented or would have so consented to it if he or they had known of the destruction or damage and its circumstances?<sup>79</sup>

In Hull one visitor to the new Banksy described seeing the piece as ‘a dream come true’, and when vandals tried to deface it, a window cleaner was hailed in the local press as saving it after cleaning whitewash off it.<sup>79</sup> Subsequent plans by the publicly elected council for regeneration of the area through graffiti also suggest ex post facto approbation.

While in principle the law may provide for excludability, Gray’s warning that there is no such thing as wholly private property should be borne in mind. Indeed, in England public authorities may order graffiti to be cleaned off private property even if the owner of that property wishes to retain the graffiti.<sup>80</sup> Further, despite the reach of the criminal law, some boroughs and councils set aside graffiti areas known as ‘free walls’ or adopt a no-prosecution policy in respect of certain areas, which become ‘graffiti tolerance zones’,<sup>81</sup> or identify graffiti as local or national heritage.<sup>82</sup> This suggests that whatever the criminal law might say, private property owners are adopting rather different standpoints.

Leaving aside the public law, there are also dilemmas in the private law of intellectual property.<sup>83</sup> The creator of a work of graffiti has intellectual property rights to that work, provided graffiti is regarded as a ‘work’,<sup>84</sup> although because of the potential criminal consequences or desire for anonymity, the ‘artist’ may not wish to be identified.<sup>85</sup> Even if these rights are limited to moral rights<sup>86</sup> because of the ‘unlawfulness’ of the activity,<sup>87</sup> these are

~~persons whom he believed to be entitled to consent to the destruction of or damage to the property in question had so consented, or would have so consented to it if he or they had known of the destruction or damage and its circumstances ...’. The belief does not have to be justified.~~

<sup>79</sup> BBC News, ‘Hull Window Cleaner Saves Defaced Banksy Mural’, *BBC News* (London, 29 January 2018) available at: <http://www.bbc.co.uk/news/uk-england-humber-42857424>.

<sup>80</sup> Under the Town and Country Planning Act 1990 a local authority can serve notice on the property owner if, in the authority’s opinion, the graffiti it is detrimental to the amenity of an area (s 215).

<sup>81</sup> In 2011 in Bristol, for example the city hosted the UK’s largest ever permanent street art project ‘See No Evil’.

<sup>82</sup> After one of Banksy’s works was scrubbed off a wall in Bristol in 2014, the Mayor of Bristol said ‘He (referring to Banksy) is part of what gives Bristol its artistic, creative and subversive spirit which makes us such a sparky place’: P Flanagan, ‘Banksy’s Boost for Bristol Youth Club’, *The Telegraph* (London, 15 April 2014) available at: <http://telegraph.co.uk/culture/culturenews/10768697/Banksys-boost-for-Bristol-youth-club.html>.

<sup>83</sup> See C Lerman, ‘Protecting Artistic Vandalism: Graffiti and Copyright Law’ (2013) 2 *New York University Journal of Intellectual Property and Entertainment Law* 295.

<sup>84</sup> Copyright, Designs, and Patents Act 1988, s 4(1), amended in parts by the Intellectual Property Act 2014.

<sup>85</sup> Anonymous work may still be subject to copyright for a statutory period of time – see, s 12(2), Copyright, Designs and Patents Act 1988 in the UK.

<sup>86</sup> Section 78, Copyright, Designs and Patents Act 1988.

<sup>87</sup> J Davies, ‘Art Crimes? Theoretical Perspectives on Copyright Protection for Illegally Created Graffiti Art’ (2012) 65 *Maine Law Review* 28–55.

still control and benefit rights recognised in law, and the law itself makes no reference to whether the act of creativity has to be lawful. Moreover, with art extending to encompass installations, public art, and performance art, it has been suggested, at least in the Banksy case, that the removal of the mural and its sale by auction could be a breach of the rights pertaining to the original artwork (removal of the medium of expression ie the wall).<sup>88</sup> The implication of a continuing intellectual property right was manifest in 2014 when Banksy gave his permission for one of his works 'Mobile Lovers' – originally attached to the building but subsequently removed for safe-keeping – to be sold by a youth centre in Bristol to raise funds.<sup>89</sup> Alternatively, any act aimed at the physical property that damages the graffiti could be viewed as a breach of the copyright to the integrity of the work.<sup>90</sup> Potentially therefore there could be a clash of property interests between, for example, the owner of a wall and the graffiti artist whose work adorns that wall.<sup>91</sup>

As with guerrilla gardening, the property rights of others may be infringed because of the potentially law-breaking nature of both activities, but the moral grounds for excludability may be undermined where these activities are adopted and/or 'legitimised' by the public or private sector: in the case of graffiti through commissioning, public approbation or the dedication of specific public and private surfaces for graffiti artists.<sup>92</sup> Normative controversy surrounds both. These activities also show that the intensions of concepts such as 'art', 'damage', 'trespass', 'greening the environment' could all apply to these extensions, thereby presenting challenges for a taxonomy, given that very different concepts could apply to the same extension. So for example, those interested in the artistic dimension of graffiti might ask 'is it art?', whereas those interested in the political dimension would perhaps focus on the use of art and/or graffiti as protest;<sup>93</sup> while lawyers might see only an infringement of property rights. An interpretivist definition of property law would place guerrilla gardening or graffiti outside the law because of non-compliance with certain concepts, while a more liberal, socially attuned, contextualist approach might bring the activity within the law because of the creative and communal qualities it fosters. Alternatively we might see these

<sup>88</sup> P McGrath, 'Banksy Under the Hammer: Graffiti and the Law' (*Incorporated Council of Law Reporting Blog*, 6 March 2013) available at: <http://www.iclr.co.uk/banksy-under-the-hammer-graffiti-and-the-law/>.

<sup>89</sup> Flanagan (n 82 above); I Johnston, 'Banksy Breaks Cover to Join Debate over "Mobile Lovers" Artwork', *The Independent* (London, 8 May 2014) available at: <http://www.independent.co.uk/arts-entertainment/art/news/banksy-breaks-cover-to-join-debate-over-disputed-mobile-lovers-artwork-9335129.html>. Banksy gave permission to the Broad Plain and Riverside Youth Project to take ownership of the piece 'Mobile Lovers'. The mayor of the city is reported to have said 'I hope it will be respected and protected as we would want for *any other legitimate work of street art*' (emphasis added).

<sup>90</sup> Integrity refers to the artist's right to object to any derogatory treatment. See E Bonadio, 'Banksy Strikes Again: Basquiat, Graffiti, and the Issue of Copyright Law', *The Conversation* (Melbourne, 22 September 2017).

<sup>91</sup> Under a Lockean approach to property both the graffiti artist and the guerrilla gardener might seek to assert the property rights of their labours.

<sup>92</sup> See for example, the annual Dundee Graffiti Jam; but note too G Ogston, 'West End of Dundee Hit by "Paris" Graffiti Tag', *The Courier* (Dundee, 3 January 2015) available at: <https://www.thecourier.co.uk/news/local/dundee/125125/west-end-of-dundee-hit-by-paris-graffiti-tag/>.

<sup>93</sup> M Dragičević-Šešić, 'The Street as Political Space: Walking as Protest, Graffiti and the Student Carnivalization of Belgrade' (2001) 17 *New Theatre Quarterly* 74; E Pindado, 'Graffiti Artists Turn Mexico City's Walls into a Collective Cry of Protest', *Splinter News* (13 March 2015) available at: <http://fusion.net/story/102767/graffiti-artists-turn-mexico-citys-walls-into-a-collective-cry-of-protests/>; S Jacobs, 'The Graffiti in Greece Shows Just How Angry its Citizens Really Are', *Business Insider UK* (London, 24 June 2015) available at: <http://uk.businessinsider.com/greeces-graffiti-artists-send-powerful-messages-of-protest-2015-6>.



surfaces of the urban landscape as neutral or 'negative space' – a term used by graffiti artists interviewed by Halsey and Young in their studies in Australia,<sup>94</sup> where claims of 'property' are overridden.<sup>95</sup>

### C. Park-Runners

As Gray suggests, 'The predominating emphasis expressed in the notion of moral non-excludability is the need to afford especial protection to those values which promote human communication and social intercourse'.<sup>96</sup> This possibility is illustrated by the debate, which erupted in April 2016, surrounding 'park-runs'. These running events held in public spaces are proving popular, but have provoked controversy regarding fee-charging by councils (on grounds such as costs of maintenance) and policies regarding group-users, and complaints from other park-users. The controversy started with Stoke Gifford Parish Council, which said it would exercise its powers under the Local Government Act 1976 to charge a fee. This local council decision escalated through social media, the press and television, culminating in a petition to Parliament.<sup>97</sup> It was argued that firstly, parks were community assets and secondly, there was a tradition of free use by the public. While it would have been possible to physically exclude the runners, the non-excludability on moral grounds can be seen in the arguments put forward against fees. For example, the benefits of the activity were that park-runs were open to all; they promoted health, wellbeing and community spirit and encouraged runners to 'get back to nature'. Park-running was also supported as an antidote to the commercialisation of running in organised events: they were aimed at getting the local community involved in exercising and participating by removing barriers to equality of opportunity such as fees, equipment/dress requirements. Given that today park-running attracts sponsors and supporters and the umbrella organisation 'Parkrun' has a large complement of staff, the non-commercial angle may be rather suspect.<sup>98</sup> Nevertheless, a number of interesting normative claims relating to the contested space emerge. Supporters excluded from running at their local park described themselves as 'exiles', while officials pointed to the environmental degradation of the ground subjected to park-runners and problems of obstruction for other users, and the infringement of the 'well-being' of non-runners.

While tensions between different park or green space users are not unusual – see for example the frequent notices prohibiting ball games, skate-boarding and so on – it has been suggested that the controversy over park-runs is a symptom of a broader contemporary concern: the 'battle of the parks'.<sup>99</sup> Increasingly people have more leisure and are being encouraged through various government and non-government programmes to 'get out'

<sup>94</sup> M Halsey and A Young, 'Our Desires are Ungovernable': Writing Graffiti in an Urban Space' (2006) 10 *Theoretical Criminology* 275, 286.

<sup>95</sup> Gray (n 33 above) 281.

<sup>96</sup> *ibid.*

<sup>97</sup> The petition was rejected on the grounds that the Health Secretary did not have the power to intervene in the Parish Council's decision.

<sup>98</sup> See the Parkrun website: <http://www.parkrun.org.uk/aboutus/>.

<sup>99</sup> J Glover, 'The Parkrun Furore and the Battle for Parks' (Local Government Information Unit, 13 May 2016) available at: <http://www.lgiu.org.uk/2016/05/13/the-parkrun-furore-and-the-battle-for-parks/>.



more and engage in healthy lifestyle choices. At the same time upper tier local authorities have responsibility for public health, while in the UK local authorities at all levels and the public sector in general are finding budgets drastically cut and are having to make decisions regarding non-essential services. The maintenance of parks and gardens may be one area where savings can be made or income increased – for example by charging professional dog walkers permit fees,<sup>100</sup> or by levying charges on specific groups of park-users. In urban areas, the problems of equitable sharing of facilities may be particularly acute because of the pressure on and shortage of green spaces and the competing demands for building land. This is the contextual reality. At the same time, there is the rhetoric of engaging more with local communities – for example under the Localism Act 2011, Part 5. Under this legislation, local communities can apply to get green spaces listed as an asset of community value, and thereby prevent the sale or change of use of such spaces for six months.<sup>101</sup> However, getting a green space listed is only a temporary measure and unless the community can raise the funds to buy the green space that is at risk, it is likely to be lost. The focus is therefore on ownership of green space rather than the maintenance of it, but this does present the possibility of public/private/hybrid ownership and/or control of parks and other spaces, and the opportunity for rethinking the relationships between local and central state and non-state agencies, organisations and communities and the physical environment.<sup>102</sup>

## V. Conclusion: Is it Time for a New Approach to Defining Property?

The possibility of a new taxonomy is inspired by Siems's comment that:

Since taxonomies can never be a perfect representation of the complexities of the real world, they can be seen as, more or less refined, conjectures – and it is then also the tasks of subsequent researchers to critically scrutinise these conjectures and try to develop better ones.<sup>103</sup>

Using Gray's definition of property and the sub-concepts that comprise the intension of 'excludability', which determines whether a 'thing' is property or not, I have tested these sub-concepts against the facts of various social activities taking place in contexts in which property rights may be claimed, but where there may be at the very least moral grounds for non-excludability. I suggest that the examples I have chosen prompt us to think about when, and in what contexts, the 'right of exclusion might be abridged by more highly valued social objectives'? Might there be, as the High Court of Australia recognised, a case for

<sup>100</sup> In London, the Royal Parks charge £300 a year for a permit.

<sup>101</sup> Localism Act 2011, Part 5 chapter 3.

<sup>102</sup> E Wallis, *Places to Be: Green spaces for active citizenship* (London, Fabian Society, 2015). In 2017 the UK Government held a consultation on preventing councils from charging fees for park-runs: Department for Communities and Local Government, *Running Free: Consultation on Preserving the Free Use of Public Parks* (London, Department for Communities and Local Government, 2017).

<sup>103</sup> MM Siems, 'A Network-Based Taxonomy of the World's Legal Systems' (Durham, Durham Law School Working Papers, 2014) 5.

emphasising the need to promote those 'moral or political standards which enrich life and constructive social interaction within a community of equals'?<sup>104</sup>

To do this we might have to move away from a purely legal taxonomy to a more interdisciplinary perspective. The value of adopting a different approach is expressed by Moore who argues: 'Many lawyers and law professors view law as an instrument for controlling society and directing social change, but most anthropologists are concerned with law as a reflection of a particular social order.'<sup>105</sup> Moving away from an interpretivist/positivist approach towards a more developmental/contextual approach, it might be possible to consider a 'consensus' theory of law that conceives of legal norms in broad (and largely sociological) terms, in other words the 'living law' is what people do,<sup>106</sup> and the repeated iteration of the lived experience may give rise to a legal framing.<sup>107</sup> This ties in with Sheehan and Arvind's implied question: 'What do we want a taxonomy of the law to do?' Alternatives have been suggested by writers such as Barker,<sup>108</sup> Hughes,<sup>109</sup> and Bannister and Kearns,<sup>110</sup> and, although primarily focused on criminal law controls, such analyses could be used to inform a new taxonomy of the law, not least, because, as the examples in this chapter show, the ways in which people interact socially with property may not be the extension of an existing legal concept but their persistence and reiteration may mean that the concept or concepts have to be rethought. The moral grounds for doing so might be prompted by a greater commitment to environment, citizenship, community, humanity or indeed democracy. Current property taxonomy means that some lived experiences remain precarious in law or indeed unlawful – the 'occupation' of doorways, railway arches or park benches by the homeless may be one example, and degrees of tolerance are inconsistent and very much a 'post-code lottery'.<sup>111</sup> At the same time, it is important to recognise that the lived experience is constantly changing so that the standards to which the High Court of Australia referred are neither static nor absolute; they constantly encounter resistance and undergo negotiation. If our taxonomy leads to a rigid definition of property then it will not be able to accommodate possible changes in the law when the law adapts to changing circumstances – the consultation by the UK Government on the prohibition of fees for park-runners is but one example.<sup>112</sup>

A dynamic taxonomy (rather than a prescriptive one) does not have to mean an abrupt severance with the historical development of the current law – indeed the activities described above take place within, but in resistance to, the current taxonomy – but it may

<sup>104</sup> Gray (n 33 above) 289.

<sup>105</sup> SF Moore, *Law as Process: An Anthropological Approach* (London, Routledge and Kegan Paul, 1978) 244.

<sup>106</sup> E Erlich, *Fundamental Principles of the Sociology of Law* (Cambridge MA, Harvard University Press, 1936).

<sup>107</sup> Y Tuan, *Space and Place: The Perspective of Experience* (Minneapolis, University of Minnesota Press, 1977).

<sup>108</sup> A Barker, 'Mediated Conviviality and the Urban Social Order: Reframing the Regulation of Public Space' (2016) 57 *British Journal of Criminology* 848.

<sup>109</sup> G Hughes, 'Communitarianism and Law and Order' (1996) 16(49) *Critical Social Policy* 17.

<sup>110</sup> J Bannister and A Kearns, 'The Function and Foundations of Urban Tolerance: Encountering and Engaging with Difference in the City' (2013) 50 *Urban Studies* 2700.

<sup>111</sup> Evidence of intolerance and 'criminalisation' was recently demonstrated in Oxford where the belongings of homeless people left to 'mark' their 'place' were confiscated and warning notices issued, but media backlash prompted a change of approach. See further on this criminalisation aspect, K Brown, 'The Hyper-Regulation of Public Space: the Use and Abuse of Public Spaces Protection Orders in England and Wales' (2017) 37 *Legal Studies* 543.

<sup>112</sup> Department for Communities and Local Government (n 112 above).

mean moving the law in a more morally justifiable direction. In the twenty-first century, this may require taking into consideration equality of opportunity, human rights, health and well-being, and more generally inclusion rather than exclusion.<sup>113</sup> Already there are indications that the law's definition of property has to shift to encompass things like security of the home; accessible and affordable housing; healthy and sustainable environments; greener cities; and inter-generational equity of resources.

If the definition of property law remains static, it will become irrelevant. So how might it be developed? As a start, and without deviating too far from Gray, a new set of sub-concepts might be introduced. So that if we refer back to the definition: "Property" is the power-relation constituted by the state's endorsement of private claims to regulate the access of strangers to the benefits of particular resources, we could introduce 'reasonableness' into regulation, bringing with it sub-concepts of proportionality and necessity (both concepts which are encountered frequently, if fluidly, in law). Further, some consideration might be given to the intrusion of 'power-relation' reflecting an acknowledged imbalance between the power of the state, the private property owner, and the third-party stranger. An extension example can be found in the construction of physical barriers to prevent rough sleepers using doorways, benches and bus shelters which has given rise to public protest and adverse media coverage, to the extent that in some cases the state has been forced to back down.<sup>114</sup> Here, it is suggested, the power-relationship has shifted. As with park-runs, social media communication creates a powerful fourth estate. Even where an owner, be it a local authority or a private landlord, has the legal right to exclude, moral indignation may mean abandoning or not enforcing that right. This is particularly so if the state can no longer endorse the exercise of that right or is ambivalent about doing so. The fourth estate might argue that the guerrilla gardener, the graffiti artist, the park-runner and the rough sleeper are all part of the *demos* reflected in our understandings of democracy. Consequently, the 'state' might need to rethink the moral grounds of endorsement and thus exclusion, and this in turn might ultimately lead to limits on the legal right to exclude. So, a new sub-set of concepts informing the existing definition of property could allow a definition of property that more nearly reflects the meaning of property in the lived experience of many urban dwellers and perhaps better reflects the values of social justice which are beginning to emerge in the second decade of the twenty-first century. If it is to be relevant, a taxonomy of property law needs to reflect this reality.

<sup>113</sup> See too S Pascoe, 'Re-evaluating Recreational Easements – New Norms for the Twenty-First Century?' Chapter 10 in this volume, where the relevance of health and well-being to the law's definition of permitted easements is discussed.

<sup>114</sup> See Brown (n 111 above).